SUPREME COURT

United States.

OCTOBER TERM, 1881.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY,
Appellant,
vs.
THE UNITED STATES.
No. 194.

THE UNITED STATES,
Appellant,
vs.
CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY.
No. 195.

BRIEF FOR CHICAGO, MILWAUKEE & ST. PAUL RAILWAY CO.

JOHN W. CARY,
Of Counsel.

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APPEALS FROM THE COURT OF CLAIMS.

The petition in this action alleges $5980.74 as due the claimant on a written contract between the parties, bearing date July 1st, 1875, whereby the claimant agreed to carry the United States mail over route, 25,002 from Milwaukee to La Crosse, in Wisconsin, on its railroad twelve times per week each way, during the period of four

years, for the consideration of $244.00 per mile per annum, including $25.00 per mile per annum for railway post office cars, which compensation was reduced $25.00 per mile per annum after the 1st day of July, by the discontinuance of said post office cars from Portage to La Crosse, leaving the compensation to be paid $219.00 per mile per annum, under the contract.

And the petition further showed that from and after the 1st day of July, 1876, the United States had refused to pay the claimant said sum of $219.00 per mile per annum according to the terms of said contract, for that portion of said route lying between Portage City and Tomah, a distance of 61.6 miles, but had only paid therefor the sum of $157.68 per mile per annum from said 1st day of July, 1876, instead of the price named in said contract; and that said deduction and refusal to pay said contract price was on the alleged ground that said railway, from Portage City to Tomah, "was constructed in whole or in part by a land grant made by Congress, on the condition that the mail should be transported over the same at such prices as Congress should by law direct."

The claimant denied that any portion of the road was constructed in whole or in part by a land grant.

The court below in its first seven findings, contained on pages 2—8 inclusive, of the case, found the facts in relation to the alleged claim that the road between Tomah and Portage was a land grant road, and decided that no part thereof

was constructed in whole or in part by a land grant made by Congress. See record, pages 2—8 inclusive; also page 10.

The eighth finding on page 9 finds that the contract was made as alleged, and that the following was one of the provisions of said contract: "9th. That the Postmaster General may discontinue or curtail the service in whole or in part whenever the public interests in his judgment shall require such discontinuance or curtailment for any cause, he allowing as a full indemnity to the contractor one month's extra pay on the amount of service dispensed with, and a pro rata compensation for the amount or service retained and continued."

The ninth finding, on page 9 of case, finds that the claimant kept and performed said contract, and that the compensation agreed to be paid by the Postmaster General in said contract was calculated on the basis of the conditions, and at the rates prescribed in an act of Congress approved March 3, 1873; and that from July 1st, 1876, to January 31st, 1878, inclusive, the Postmaster General had paid the claimant at the rate of $157.68 per mile per annum for the portion of route 25002 lying between Portage and Tomah; and that said amount was reached by first reducing the compensation named in the contract of July 1, 1875, of $219.00 per mile per annum ten per centum per annum, and then allowing eighty per centum of the whole pay after such reduction, because

that portion of said route was claimed to be a railroad constructed in whole or in part by a land grant made by Congress, on condition that the mail should be transported over the road at such price as Congress by law should direct.

The tenth finding is as follows: "10th. If the defendants are entitled to make no deductions from the contract rates, then there is still due the claimants the sum of $5980.74 for the service performed from July 1st, 1876, to January 31, 1878, both inclusive."

"If the defendants are entitled to deduct from the contract price the ten per centum mentioned in section one of the act of July 12, 1876, and no more, for said service, from July 1, 1876, to January 31, 1878, both inclusive, then there is still due the claimants for such service $3844.75."

"If the claimants are entitled to make such deduction only from the 12th day of July, 1876, then there is still due the claimants for such service $3888.75."

"If the defendants are entitled to deduct from the contract price the ten per centum, and also the twenty per centum mentioned in the thirteenth section of said act of July 12th, 1876, then the claimants are not entitled to recover anything."

The conclusions of law as found by the court, on page 10 of the record, are as follows:

1st. That the claimants' railroad was not con-

structed in whole or in part by a land grant by Congress.

2nd. That the defendant is entitled to readjust the compensation to be paid to claimant for the transportation of the mails over their road after July 12, 1876, by reducing said compensation ten per centum per annum from rates named in the contract referred to in the petition, but such readjustment to bind the claimants only when expressly or tacitly assented to by them.

3d. That the claimants are entitled to recover from the defendant the sum of $3885.99.

The claimant, appellant, in No. 194, assigns for error:

1st. That the second conclusion of law, as found by the court below, is not warranted by the facts, and is erroneous.

2nd. The court below erred in not giving judgment in favor of the claimant for $5980.74, as claimed.

As to the appeal of the United States in No. 195, it is submitted that:

I.

The first conclusion of law as found by the court below, viz: "That the claimants' railroad was not constructed in whole or in part by a land grant made by Congress," should be affirmed.

The findings of fact in the court below showed that on the 3rd day of June, 1856, a grant of land was made to the State of Wisconsin to aid

in the construction of a railroad from Madison to Columbus by way of Portage City to the St. Croix River or Lake, between townships 25 and 31, and thence to the west end of Lake Superior and to Bayfield; and that said grant was conferred upon the La Crosse & Milwaukee Railroad Company upon certain conditions. That the La Crosse & Milwaukee Railroad Company was at the time engaged in constructing a railroad from Milwaukee to La Crosse, and that the portion of road between Portage and Tomah was common to the line of the La Crosse road, and also to the line of the land grant, and that the road was constructed by the La Crosse Company from Portage to Tomah. That in conferring said grant upon the La Crosse Company it was provided that said company should commence the construction of said land grant road at Madison and at Columbus, and that the road should be completed from Madison and Columbus to Portage during the year 1858. That said portion of said land grant road was never constructed by the La Crosse Company, and that no portion of the road on the land grant line was ever constructed by the La Crosse Company, except that portion from Portage to Tomah. That application was made by the La Crosse Company to the Governor of Wisconsin for a deed of the lands of said land grant applicable to the construction of that portion of the road between Portage and Tomah, and that the Governor refused to convey said lands to said

company on the ground that the road from Madison and Columbus had not been constructed, as required by the grant, to Portage City, and that no part of said land grant was ever conveyed to said La Crosse Company or its assigns or privies in estate.

That the right of said La Crosse Company to said lands was mortgaged in the mortgage of their road, to Greene C. Bronson and others, trustees, and that that right was foreclosed under said mortgage and sold, and became vested in the complainant, and that the claimant then made application to the Governor for a conveyance of said lands to the claimant; but that said application was refused; and that afterwards the legislature of the State of Wisconsin, with the consent of Congress, conferred those lands upon a corporation formed by the State of Wisconsin, known as the Wisconsin Farm Mortgage Land Company, and that the claimant afterwards quit-claimed any right that it might be supposed to have to said lands to said company.

The grant of June 3d, 1856, conferred the lands *in praesenti* to the State of Wisconsin. The State of Wisconsin, by the act of 11th of October, 1856, granted those lands conditionally to the La Crosse Company, and provided that on the performance of those conditions the Governor should convey the lands by patent to said company. This the Governor refused to do, alleging that the company had not performed the conditions upon which the grant was made.

No title to them ever passed to the La Crosse Company or the claimant, and the court below, in its opinion (see p. 11 of the case.)

"The State executed the trust thus reposed in it by conferring upon the La Crosse & Milwaukee Railroad Company, a pre-existing corporation, whose proposed railroad would pass over 61.6 miles of the road contemplated by Congress, the further right to construct the Congressional road and receive the benefit of the land grant; but the measures taken by the State to transfer the land grant to the Company differed radically from those taken by Congress to pass the lands to the State.

Congress made a statutory grant *in præsenti*, but the State, although declaring that the rights granted by Congress were thereby granted to the Company, enacted that the title to the lands should vest in said Company only as the Governor of the State should certify to the Secretary of the Interior that a section of twenty miles was completed so as to admit of running regular trains over it; and it further made it the duty of the Governor 'in his official capacity, and in behalf of the State, and under the great seal thereof, to execute and deliver to the La Crosse & Milwaukee Railroad Company, whenever it should by virtue of the provisions of the act be entitled to any of said lands, a deed in fee simple of any of the lands to which said company should be entitled.' It is manifest that the railroad company did not acquire title by the mere passage of the statute, as did the State of Wisconsin. By

the completion of a section, according to the terms of the act, they acquired a right in equity to demand legal title from the State, but the State clearly proposed to keep within itself the legal title until its Governor should execute and deliver the deed or deeds contemplated by the act.

That it was the trustee's duty to retain such control over the trust property as would enable it to enforce the application of it to the object of the trust, in the manner contemplated by Congress, is plain. Whether the State used the power which it thus retained justly or unjustly, wisely or unwisely, toward the La Crosse & Milwaukee Railroad Company, and toward their privies in estate, among whom are the claimants, is not for us to determine. We are to be governed by the undisputed facts that after the La Crosse & Milwaukee Railroad Company had constructed 61.6 miles of railroad on the line projected by Congress, and under the authority derived from the statute which the State had enacted to carry out the trust which it had assumed toward Congress, the State refused to give the company the benefit of the trust property, and that neither that company, nor any of its privies in estate, has ever received the least direct benefit from the trust.

On the contrary, after repeated efforts on the part of that company, and the trustees of their mortgage and of the claimants, to secure some benefit from it, the claimants finally acquiesced in a different disposition of the trust property made by the State for the benefit of other parties,

with the consent of Congress, that creator of the trust."

As to the claim made in the court below, that the final disposition of the property made by the State, with the consent of Congress, was, in fact, an equitable execution of the original trust see the opinion of the court below, pp. 11 and 12.

It is manifest, therefore, that the road in question is not a land grant railroad, or "a railroad constructed in whole or in part by a land grant made by Congress, on the condition that the mails should be transported over said road at such price as Congress should by law direct."

There can be no pretence that this case is within the terms of the statute of July 12, 1876. Section 13 of that act only applies to such roads as were *constructed in whole or in part by a land grant.* No land grant has ever gone to this road. Not one foot of land was ever granted to it from any grant made by Congress. No part of it was built from any such fund, as no such fund was ever received. Congress made a grant to the State. The State promised to give it to the company building this road, on certain conditions, but they never did give it or any part of it, the State claiming that the conditions were never fulfilled by the company. But, whether fulfilled or not, the company did not get the lands; consequently the road was not built in whole or in part by any such grant. It is not, therefore, within the terms of the statute, and

there was no authority for withholding any part of our pay on any such ground. The fact that this La Crosse company had a conditional promise of the grant, and built its road over a portion of the land grant line, does not make it a land grant road if it never got the grant. The line belonged to the La Crosse company before the grant was made by Congress.

II.

The grant was only to pass to the La Crosse company on the performance of the conditions prescribed by the State. These conditions were never complied with.

Congress made the grant to the State of Wisconsin to aid in the construction of a certain line of railroad. The State had full, absolute and complete power to dispose of it. It was competent for the Sate to build the road through its own agencies and hold the grant to itself. Or it might confer it upon any person or corporation it chose, and upon such terms as to the State seemed proper, provided they were not inconsistent with the grant. The State insists that one of the terms and conditions upon which the La Crosse company were to have this grant was that it should commence the construction of the road at Madison and Columbus, and build both branches to Portage City simultaneously, as near as possible, and have both completed on or before December 31, 1858. This was not an unreasonable or improper condition to make. It was that

the company should commence at one end of the grant, and that the most feasible end for building, and complete about seventy miles of the road in something over two years. The second section of the act appears to contemplate and provide what the State claims. It is therefore respectfully submitted that the company did not perform the conditions of the grant, so as to entitle it to the land. It commenced the construction at a point in the middle of the grant, because it was convenient for them to do so, and perhaps with intention of never building any part of the line, except their original line from Milwaukee to La Crosse. It never did build any other, and it is, perhaps, fair to presume that such was their intention. Under the circumstances, the State was justified in insisting upon the conditions of the grant and its strict performance. The State never in any manner waived this condition, but have at all times insisted upon it. Hence the La Crosse company never earned this grant. It was never given to them, and no part of the road in question was constructed by a land grant made by Congress, and therefore there was no authority for withholding any part of our pay under said contract.

III.

The question now before the courts is not whether the State was right or wrong in withholding these lands from the La Crosse company.

The State did withhold them on the pretext stated, and the United States government, when appealed to, sanctioned the act of the State and refused to give any relief. After five years' persistent effort to obtain the lands, the company gave up the pursuit and abandoned all claim. It is now too late for the government, either State or national, to change ground and say that the La Crosse company did earn and were entitled to these lands, but we wrongfully refused to recognize their claim and deprived them of all benefit of the grant, and we now acknowledge our error and claim that the company shall be subjected to all the burthens of the grant for *our profit and advantage*, although we wrongfully deprived it of all benefits arising therefrom. Were the company now insisting upon its rights to the lands granted, you would then have to examine this question and decide whether or not it ever earned them ; but the present question is, did we ever *receive* any lands from this grant ? We answer, No ; we never received the lands. You would not let us have them when we wanted them, and when we were entitled to them, if ever. We have now ceased to care for them, are making no claim for them, and have submitted to your construction of our rights. The governments of both the State and nation are estopped to make the claim now set up. Having taken their stand upon the question, and compelled us to act in accordance with it, they are estopped to

change front. We are not asking to have their decision reversed, or any relief from it, but propose to submit to it and stand upon it, and only ask that they be compelled to do likewise. The decision of the Court of Claims on this question was right, and must be affirmed.

IV.

Should this Court determine on the facts in this case, that the road in question is a land grant road, or "a railroad constructed in whole or in part by a land grant made by Congress, on the condition that the mails should be transported over said road at such price as Congress should by law direct," then we submit that the plaintiff should recover the amount claimed, for the reason that the act of Congress of July 12th, 1876, does not authorize the United States to violate or disregard the terms and provisions of the written contract of the government, made with the plaintiff, for carrying the mail over post route 25,002, from Milwaukee to La Crosse.

That a subsequent act of Congress will not authorize the government, or any of its departments, to violate the terms of an existing, valid contract, needs no argument or authority.

The fifth section of the act of July 3d, 1856, the land grant act, is in the words: "And be it further enacted, that the United States mail shall be transported over said roads, under the directions of the Post Office Department, at such price as Congress may by law direct, provided,

that until such price is fixed by law, the Post Master General shall have the power to determine the same." No law on the subject was passed prior to July 12th, 1876; consequently, up to that time the Post Master General had the right to fix the price. In accordance with the uniform course of business of the department, he fixed that price once in four years, and made written contracts with the companies carrying the mail. This he was authorized to do. The contracts so made were not subject to the future legislation of Congress, but were legal and binding until their expiration.

At that time the act of Congress would apply and fix the price. The Post Master General was fully authorized to make such contract, and, if authorized, the contract was binding for the full term contracted. It must have been intended that the Post Master General would fix the price in this case, as he did in all others, until Congress saw fit to act, and he was, therefore, authorized by the law and the uniform course of business in his department, to make this contract for four years. It is, therefore, binding, and not subject to the act of July 12th, 1876, and no deduction from the contract price could be made on account thereof, even if that part of the route could be considered a land grant road.

V.

As to the appeal of the claimant in No. 194, the appellant says:

That the second conclusion of law as found by the court below, is not warranted by the facts, and is erroneous.

The court below as its second conclusion say: "That the defendants are entitled to readjust the compensation to be paid to the claimants for the transportation of the mails over their road after July 12, 1876, by reducing said compensation ten per centum per annum, from rates named in the contract referred to in the petition, but such readjustment could bind the claimants only when expressly or tacitly assented to by them."

It was argued by the defendant in the court below, that, notwithstanding the United States had entered into a contract with the claimant, still that the defendant could not be bound by such contract, so as to preclude the defendant in its character of sovereign, to alter, amend or change it, and that the act of Congress was the exercise of its sovereign power, and that the claimants could not object to the terms of the contract so as to prevent the carrying out of the provisions of the statute of July 12, 1876. But the court below rejected this doctrine, and in their opinion, pp. 12 and 13 say: "We are all of the opinion that when a contract for a term of time, is made under due authority of law, by duly authorized agents of the United States, the United States cannot by their own legislative act vary the terms of the contract in their own favor, without the assent of the other party. If there

were no other question involved, it would not be necessary to go further with this branch of the case."

It was further contended by the defendant below that this contract was not authorized by statute. On this point also the court held against the defendant; and held that the contract with the claimant was in accordance with an extensive usage in the Post Office Department, and was authorized by statute.

See section 3956, of the Revised Statutes.

The court below therefore held in this case, that the defendant has no power to alter or change a contract, made under authority of law by a department of the Government; and further held, that the contract in this case was authorized by law, and that its term was for four years, unless sooner terminated under its own provisions; but it then held that by the terms of the contract the defendant was authorized to change the rate to be paid for transportation under this contract, in the manner in which it was done.

This the claimant denies, and insists that no such right was reserved to the defendant by the contract. This pretended right is based wholly upon the ninth sub-division of the contract, which the court finds in these words—p. 9: "9th. That the Post Master General may discontinue or curtail the service in whole or in part, whenever the public interests in his judgment shall require such discontinuance or curtailment for any cause;

he allowing as a full indemity to the contractor, one month's extra pay on the amount of service dispensed with, and a pro rata compensation for the amount of service retained and continued."

What is the meaning of this clause of the contract? It does not authorize the defendant to alter or change the prices to be paid for the service rendered. It does not authorize a readjustment of the compensation to be paid the claimant for the transportation of the mail, as found in the conclusion of law, but only authorized the discontinuance or curtailment, in whole or in part of the service to be performed, and when such discontinuance or curtailment is made that the compensation shall be reduced correspondingly. It gives no authority to alter or change the compensation provided. It was competent for the Post Master General under this clause, to discontiuue the carrying of the mail altogether if the public interests, in his judgment should so require, and in that case all compensation would cease; or it was competent for him to curtail the service by directing that the mail should only be carried six times a week, instead of twelve, and when so discontinued or curtailed, the compensation, after the payment of one month's pay, would be readjusted to correspond with the diminished service. It authorized the Postmaster to do what he did do in this case, in regard to the discontinuance of post-office-cars on a portion of the road. The terms of the contract provided that the claimant

should carry the United States mail over said route 25,002, from Milwaukee to La Crosse, on said railway, twelve times a week each way, for a period of four years from July 1st, 1875, for the consideration of $244.00 per mile, per annum, including $25.00 per mile, per annum for railway postoffice-cars, which said amount the United States agreed to pay for said service.

Under the clause in question it subsequently discontinued railway post-office-cars from Portage to La Crosse, and thereby reduced the compensation to be paid for that distance, $25.00 per mile, per annum, to-wit, to the sum of $219.00 per mile, per annum.

This was a legitimate exercise of the power reserved by the 9th sub-division of the contract. No other change, discontinuance or curtailment of the service was ever ordered by the Postmaster General, and the contract in all other respects continued in full force.

The defendant could only do under this ninth clause what was authorized by it. He was authorized to discontinue or curtail the service in whole or in part, but was not authorized to reduce or readjust the compensation to be paid for the service specified in the contract. If the service was reduced the compensation could be reduced correspondingly, but if there was no reduction of the service there could be no readjustment of the compensation to be paid for it.

The full service was demanded and rendered, as provided by the contract, and in that case no reduction or readjustment of compensation was authorized.

The court below did not pretend that any discontinuance or curtailment of service was ever made by the Post Master General, but claimed that the act of Congress was a "notice to the claimant that the service would be discontinued under the old rates, and would be continued, if at all, under the new rates."

This neither Congress nor the Post Master General had any right to do. The statute gives notice of no such thing. It simply says that the compensation should be reduced—not that the service was to be discontinued. It was an arbitrary act on the part of the defendant, wholly in violation of the contract rights of the plaintiff.

The court further say that, "After this notice the claimants were at liberty to stop carrying the mails." This we most respectfully deny, and had the claimant on the passage of that act, refused longer to carry the mail under the contract, the defendant might rightfully have insisted upon the performance of the contract and imposed the fines and penalties provided by law in cases of refusal. It would have been no answer for the claimant to have said that Congress had passed a law, directing the reduction of the compensation to be paid for the carrying of the mails. No court would have accepted

such an excuse for the refusal of the plaintiff to have continued to perform the service under this contract, and notwithstanding the passage of this act, the Government could still have held the claimant to the strict performance of all the terms of the contract.

The finding further says: "But such readjustment could bind the claimants only when expressly or tacitly assented to by them," and in the opinion (p. 13) the court say: "The claimants, however, made no objection to the notice contained in the statute, and so far as appears in this case continued to render the service under the new rule, without dissent or protest. We must presume that they acquiesced in its provisions and accepted the change which it made in their contract."

It is denied that any such presumption can be indulged in, in this case. The contract ran from July 1st, 1875, to June 30th, 1879. The first notice that a readjustment of the pay was claimed, was made in the fall of 1876, and this suit was commenced early in February, 1878, while the contract was still in force. This fact alone would rebut all presumption that the claimant acquiesced in the claim that its pay should be reduced.

Second. Defendants denied that the court, under the circumstances detailed in this case, aside from the commencement of the suit, would be authorized to presume an acquiescence of the

defendant. In fact the claimant did vigorously protest against the said proposed reduction, and continued that protest until the time of the commencement of the suit, but no proof of those facts was made in this case, for the reason that it was not necessary to do so, and such proof would have been wholly irrelevant to the issue involved, and so the court below decided subsequently in the case of the Chicago & Northwestern Railway Company vs. The United States, which is numbered 508 on the present term of this court.

Third. It is respectfully submitted that the act of Congress of July 12, 1876, never directed the Post Master General to readjust the compensation to be paid on the then existing price for carrying the mail, and that it was not intended that it should have such construction.

The act of March 3, 1873, section 402 of the Revised Statutes, provided that the pay per mile, per annum, should not exceed the following rates, viz: On routes carrying their whole length an average weight of mail per day of 200 lbs., $50.00, 500, $75,00, 1000, $100.00, the average weight to be ascertained by the actual weighing of the mails not less frequently than once in every four years.

The act of July 12th, provided: "That the Post Master General be, and he is hereby authorized and directed, to readjust the compensation to be paid from and after the 1st day of

July, 1876, for transportation of mails on railroad routes, by reducing the compensation to all railroad companies for the transportation of mails ten per centum per annum, from the rates fixed and allowed by the first section of an act, entitled: An act making appropriations for the service of the Post Office Department for the fiscal year, ending June 30, 1874, and for other purposes, and approved March 3, 1873, for the transportation of mails on the basis of the average weight."

The fair construction of these acts would be that it was the intention of Congress, by the act of July 12, to change the act of 1873, fixing the amount to be paid for the transportation of the mails in all contracts thereafter to be made, and that it was not its intention to attempt to interfere with existing contracts. No such construction of the statute was intended, and it is not authorized, and such was the opinion of the Attorney General.

See 15th volume of opinions of Attorney Generals, 182; and the action of the department since, in all cases except land grant roads, has been in accordance with that opinion.

This court cannot assume in the construction of this statute, it was the deliberate intention of Congress to violate all existing contracts, or to override them. A layman might be excused for so construing the act, but not a lawyer.

VI.

The court below erred in not giving judgment in favor of the claimant for $5980.74 as claimed in the petition.

The first clause of the tenth finding of fact (p. 9 of case) is as follows: "If the defendants are entitled to make no deductions from the contract rates then there is still due the claimants the sum of $5980.74 for the service performed from July 1st, 1876, to January 31st, 1878, both inclusive.

The judgment should therefore be reversed and judgment entered for the sum claimed.

JOHN W. CARY,
Of Counsel.

In the Supreme Court of the United States.

OCTOBER TERM, 1881.

THE CHICAGO, MILWAUKEE, &C., Railway Company,
vs.
THE UNITED STATES AND *vice versâ*. } Nos. 194,'5.

BRIEF FOR THE UNITED STATES.

This was a claim to recover certain deductions made from the pay due the claimant for postal service under the act of 1876, ch. 179 (Richardson, p. 224), ss. 1 and 13.

It had been claimed by the United States that the company was a land grant company and so subject to the deductions, not only of the 1st section above cited (*i. e.*, 10 per cent. of rates previously fixed), but also of the 13th section, which fixed the pay of *land grant roads* at 80 per cent. of the compensation allowed under section 1.

The court below decided that the company was subject to the deduction allowed in section 1, but not to that in section 13. From the former part of that decision the

company appealed, and from the latter, the United States.

The facts are stated at length on pp. 2, &c., of the record, and are well abbreviated in the opinion of the learned court below, on pp. 10, &c.

1. In No. 194 the United States rely upon that part of the opinion below which begins on folio 14, "the defendants further contend," &c.

2. In No. 195 the material question is whether the company is a *land grant* company.

Upon this point the facts are that in June, 1856, the United States granted to the State of Wisconsin certain lands for specified railroad purposes, and that in October thereafter the State granted the same to the La Crosse & Milwaukee Company, and directed that whenever twenty miles of the road should be completed the governor should certify the same to the Secretary of the Interior, and should execute a deed to the company for so much of the lands as it might become entitled to, such lands to be exclusively applied to the construction of the road.

The company constructed 61.6 miles of road, but for some reason could not obtain from the governor of the State a certificate or deed.

In December, 1856, the company executed a mortgage of all of its property, including its right to the land grant, in order to secure an issue of bonds.

In January, 1862, the mortgage was foreclosed and the property therein included afterward conveyed to the present claimants; but they never have become possessed of the lands granted as above, nor have they received patents or a deed therefor.

In March, 1868, the State of Wisconsin gave its con-

sent that said lands might be donated and applied to the use of certain parties who had given mortgages to aid in constructing the *La Crosse & Milwaukee*, and the *Milwaukee & Horicon* Railroads, and it named commissioners and incorporated a Mortgage Land Company, in order to carry out such purposes.

Subsequently Congress authorized the State to dispose of the lands due to it on account of the portion of the road already completed, for the benefit of the said Mortgage Land Company; and in September, 1868, the claimants, in the name of the Milwaukee and Saint Paul Railway Company, executed to the Mortgage Land Company a deed of grant, quit-claim, and release of the lands included in the grant first above mentioned.

For error is assigned the judgment of the court in favor of the claimants for $3,885.99.

The question is, whether the above facts constitute the claimants a land grant company.

In effect the lands were applied to the purpose of constructing, in part, the road of the claimants, for they were substituted for lands which had previously secured such construction. Substantially, therefore, the consideration for which it was agreed that the United States should have certain privileges had been by them paid. The details in applying the lands to railroad uses, whether by constructing the road, by being deeded to contractors, or by securing bondholders, or by originally securing or finally indemnifying parties who had previously come forward in aid of the road by giving mortgages upon their own lands, was not material.

The consent given by Congress to the final applica-